Supreme Court, U.S.
FILED
FEB 28 2002
CLERK

(2)

No. 01-1107

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHON O'MARA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF ARIZONA, CALIFORNIA, GEORGIA, KANSAS, MASSACHUSETTS, MISSOURI, OKLAHOMA, UTAH, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JANET NAPOLITANO
Attorney General of Arizona

PATRICK IRVINE*
Solicitor General
TODD F. LANG
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8384

[Additional Counsel Listed On Inside Cover]

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15PP

BILL LOCKYER
Attorney General
State of California
Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square S.W.
Atlanta, GA 30334-1300
(404) 656-4585

CARLA J. STOVALL
Attorney General of Kansas
Judicial Building
301 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215

THOMAS F. REILLY
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108-1598
(617) 727-2200

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

W. A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105-4894
(405) 521-3921

MARK L. SHURTLEFF
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114
(801) 538-9600

CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 1

I. States Have Compelling Interests in Addressing the Real Problems Arising From Bias-Motivated Intimidation 2

II. Prohibiting Cross Burning With the Intent to Intimidate Any Person Does Not Violate the First Amendment 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 6

Black v. Commonwealth, 553 S.E.2d 738 (Va. 2001) 6

Chaplinsky v. New Hampshire, 314 U.S. 568 (1942) 9

R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992) 6, 8, 9

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 4

State v. T.B.D., 656 So.2d 479 (Fla. 1995) 7

United States v. O'Brien, 391 U.S. 367 (1968) 6, 9

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 4, 5, 7, 8

CONSTITUTIONS

U.S. CONST. amend. I 1

FEDERAL STATUTES AND RULES

Pub.L. No. 101-275, 104 Stat. 140 3

Pub.L. No. 103-322, 108 Stat. 1796 4

SUP. CT. R. 10(b) 1

STATE STATUTES

Arizona Revised Statutes Annotated § 13-1202 6

California Penal Code § 11411 2

Connecticut General Statutes § 46a-58 2

Delaware Code 11 § 805 2

District of Columbia Code § 22-3312.02 2

TABLE OF AUTHORITIES – Continued

Page

Florida Statutes § 876.17 2

Florida Statutes § 876.18 2

Official Code of Georgia § 16-11-37 2

Idaho Code § 18-7902 2

Montana Code Annotated § 45-5-221 3

North Carolina General Statutes § 14-12.12 3

South Carolina Code Annotated § 16-7-120 3

South Dakota Codified Laws § 22-19B-2 3

Vermont Statutes Annotated 13 § 1456 3

Virginia Code § 18.2-423 3

Revised Code of Washington § 9A.36.080 3

OTHER AUTHORITIES

Federal Bureau of Investigation, *Hate Crime Statistics, 1998*, at 9, Table 3 (http://www.fbi.gov/ucr/98hate.pdf) 4

Lu-in Wang, *Hate Crimes Law* (1999) 2

Luddington, Annotation, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R.4th 949 (1986) 2

INTEREST OF *AMICI CURIAE*

The Supreme Court of Virginia in this case held that Virginia's statute making it a criminal offense to burn a cross with the intent to intimidate any person violates the First Amendment of the United States Constitution. The decision squarely conflicts with decisions of the courts of other states. It is in the states' interests that this conflict be resolved by this Court so that state policymakers who have acted, or may in the future wish to act, to ban intimidating, threatening and terrorizing conduct using symbols, such as burning crosses, may know whether such efforts are constitutionally permissible.

REASONS FOR GRANTING THE PETITION

The Petition correctly points out the conflict between the decision of the Supreme Court of Virginia and decisions by courts in Florida, Washington and California, and the conflict with the Seventh and Eighth Circuits. Petition at 14-20, 23-25. In considering whether a writ of certiorari shall be granted, this Court has indicated that an important consideration will be that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *See* SUP. CT. R. 10(b). State and federal courts are divided over the constitutionality of statutes prohibiting cross burning with the intent to intimidate or terrorize any persons. For the following reasons, *Amici* are affected by this division and believe the Petition should be granted.

I. STATES HAVE COMPELLING INTERESTS IN ADDRESSING THE REAL PROBLEMS ARISING FROM BIAS-MOTIVATED INTIMIDATION.

Numerous states have laws prohibiting threats, intimidation and terroristic acts.[1] At least fourteen states have statutes expressly referring to criminal acts involving cross burning.[2] These statutes reflect the strong

---

[1] *See generally* Lu-in Wang, *Hate Crimes Law* (1999); Luddington, Annotation, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R.4th 949 (1986).

[2] California Penal Code § 11411 (burning or desecrating a cross or other religious symbol on the private property of another without authorization for the purpose of terrorizing the owner or occupant, or on the property of a primary school, junior high school or high school or the purpose of terrorizing any person who attends or works at the school); Connecticut General Statutes § 46a-58 (placing a burning cross on any public property, or on any private property without the written consent of the owner); 11 Delaware Code § 805 (burns any cross or religious symbol upon any private or public property without the express written consent of the owner and without a minimum of 48 hours notice to authorities); District of Columbia Code § 22-3312.02 (burning cross or other religious symbol on any private premises or property used for specified purposes by persons of a particular race, color, creed, or religion, or on any public property, with the intent to intimidate, threaten, abuse, or harass any other person); Florida Statutes § 876.17 (placing in a public place a burning cross); Florida Statutes § 876.18 (placing on the property of another a burning cross without first obtaining written permission of the owner or occupier of the premises); Official Code of Georgia Annotated § 16-11-37 (committing offense of terroristic act when using a burning cross with the intent to terrorize another or another's household); Idaho Code § 18-7902 (cross burning included within definition of defacing property with the intent to intimidate or harass another person because of that person's

interests of state and local governments in putting a stop to a particularly invidious sort of intimidation that go beyond their general interests in maintaining peace and order. Expressions of hate and bigotry are protected by the Constitution, but actions taken to harm, threaten, intimidate or terrorize others are not equally protected merely because they are rooted in such hate and bigotry.

Hate crimes are not in decline. In 1990, Congress enacted the Hate Crime Statistics Act, Pub.L. No. 101-275, § 1(b)(1), 104 Stat. 140 (codified at 28 U.S.C. § 534), directing the Attorney General to compile data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Pursuant to the Act, the Federal Bureau of Investigation annually reports

---

race, color, religion, ancestry, or national origin); Montana Code Annotated § 45-5-221 (same); North Carolina General Statutes § 14-12.12 (placing burning cross on the property of another without first obtaining written permission, or on a public street or highway with the intention of intimidating any person or persons); South Carolina Code Annotated § 16-7-120 (placing a burning cross in a public place or on the property of another without first obtaining written permission); South Dakota Codified Laws § 22-19B-2 (defining crime of defacing to include cross burning on the property of another without that person's permission); 13 Vermont Statutes Annotated § 1456 (burning cross with the intention of terrorizing or harassing a particular person or persons); Virginia Code § 18.2-423 (burning cross with the intent to intimidate); Revised Code of Washington § 9A.36.080 (in a prosecution for malicious harassment based on the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap, the burning of a cross on the property of a victim who is of African American heritage may be basis to infer intent to threaten victim unless evidence exists which explains that the person did not intend such threat).

bias-motivated crimes. Relying on the Bureau's reports, this Court has previously noted that in 1991 there were 4,558 bias-motivated offenses committed, including 1,614 incidents of intimidation, 1,301 incidents of vandalism, 796 simple assaults, 773 aggravated assaults, and 12 murders. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 n.4 (1993).

More recent data is not heartening. The Bureau reports that in 1998, a total of 7,755[3] bias-motivated criminal incidents were reported, including 3,488 incidents of intimidation, 2,549 incidents of vandalism, 1,706 simple assaults, 1,084 aggravated assaults, and 13 murders. Federal Bureau of Investigation, *Hate Crime Statistics, 1998*, at 9, Table 3 (http://www.fbi.gov/ucr/98hate.pdf). States cannot be expected to ignore the real problems associated with these acts of violence and terror.

States recognize that the expression of ideas is properly protected by the Constitution, whether expressed verbally or symbolically. There can be little question that cross burning conveys a message, albeit a message of intimidation. When a cross is burned with the intent to intimidate a particular person or group of persons, it inflicts immediate injury by subjecting the victim to fear and conveys a threat of future harm. State law should be allowed to protect the victim of such an act. *See Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[V]iolence

---

[3] The Hate Crime Statistics Act was amended by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, to include those crimes motivated by a bias against persons with disabilities. The 1998 total, however, includes only 25 disability related crimes, so the 1991 and 1998 data effectively measure the same acts.

or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.").

The decision below casts doubt on the ability of any state to act to protect its citizens against criminal actions intended to intimidate and terrorize them. Merely because the terror and intimidation is effectuated by using a symbol such as a burning cross does not render it any less dangerous or pernicious. The Court should grant certiorari and clarify the proper application of its precedents in this important area.

II. PROHIBITING CROSS BURNING WITH THE INTENT TO INTIMIDATE ANY PERSON DOES NOT VIOLATE THE FIRST AMENDMENT.

This case involves the confluence of several significant, and sometimes competing, societal values: the fundamental principle that preservation of peace and prevention of intimidation and terror are necessary to the maintenance of the social fabric; and the equally basic premise that freedom of speech preserves and strengthens our democratic society. *Amici* believe that a statute prohibiting cross burning with the intent to intimidate any person or group of persons adequately and reasonably reconciles these values, and should be upheld.

This Court's "cases reject the 'view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*,

508 U.S. at 484, quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (citations omitted). Intimidating, threatening and terrorizing are plainly criminal acts that can be punished.[4] The acts are not entitled to constitutional protection. Such protection should not be extended merely because the prohibited act itself might be protected if not done for the purpose of intimidation or terror.

The Virginia statute does not prohibit cross burning; it prohibits cross burning with the intent to intimidate. The lower court failed to consider the statute as a whole, and essentially applied its constitutional analysis only to the action itself, ignoring the intent requirement. This Court has recognized, however, that an intention to intimidate is a separate element of a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 493 (2000) ("The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.' ").

States are not prohibited from defining intimidation, threats and terror in a way that specifies certain symbols as being particularly susceptible to being used for such purposes. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 416 (1992) (Stevens, J. concurring) ("Conduct that creates special risks or causes special harms may be prohibited by special rules."). In this case, the Virginia Supreme Court recognized that burning a circle or a square would not have the same threatening effect as burning a cross. *Black v. Commonwealth*, 553 S.E.2d 738, 745 (Va. 2001). Its conclusion, however, actually encourages statutes that do not fully inform citizens of the harm

---

[4] *See, e.g.*, Ariz. Rev. Stat. § 13-1202.

sought to be prevented. The lower court opinion suggests it would approve of a statute that prohibits the burning of a circle, square or other shape with the intent to intimidate. Such a solution would pass the lower court's test, but be of little practical use. *State v. T.B.D.*, 656 So.2d 479, 482 (Fla. 1995) ("While other Florida statutes may address unauthorized cross-burnings indirectly, e.g., via trespassing or disorderly conduct bans, those restrictions fail to confront the issue head on and to affirmatively discourage the conduct."). Moreover, since the burning of geometric shapes other than crosses occurs rarely, if at all, it is not clear why a modified statute would be an improvement. Nor is it clear that such a statute would go unchallenged since cross burners would still be able to argue that they are the ones truly targeted by the revised law. States should be able to address the specific problem with specific legislation. In this case, cross burning to express ideas, however obnoxious, is not the problem. The problem addressed by the state statute is cross burning when associated with the intent to intimidate.

This Court has recognized that bias-inspired conduct may be subject to greater penalties than the same crime without the bias. *Wisconsin v. Mitchell*, 508 U.S. at 487-488. Thus, states are allowed to deal with real problems associated with bias.

> The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public

> safety and happiness." 4 W. Blackstone, Commentaries 16.

Id. at 488. Cross burning is an especially virulent, even unique, form of intimidation in American society. States should not be required to equate it with lesser forms of intimidation, such as threatened fisticuffs, merely because the symbol is also associated with hatred and bigotry. Similarly, states need not recognize acts plainly based on bias and hate, such as cross burnings, without taking steps to prevent their use in the criminal act of intimidation.

This Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992) does not require states to ignore the real law enforcement problems associated with the use of words and symbols for purposes of intimidation and terror. In *R.A.V.*, this Court observed that proscribable speech, such as "fighting words" can be regulated. The problem in *R.A.V.* was that the government only proscribed certain fighting words based on content. Such content-based regulation of even "unprotected" speech is impermissible. *R.A.V.*, 505 U.S. at 386. Just as this Court noted that "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government," *id.* at 384, states may proscribe cross burning. Under *R.A.V.*, what states may not do is ban cross burning that targets, for example, only persons of a certain race or sexual orientation, because such a ban would distinguish permissible and impermissible cross burnings based on content. "[N]on-verbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *Id.* at 385. Here, the statute

prohibits non-verbal expressive activity – cross burning – regardless of the particular viewpoint of the speaker. Just as "fighting words" can be proscribed under *Chaplinsky v. New Hampshire*, 314 U.S. 568 (1942), so too may cross burning be banned so long as the prohibition is not based on content or viewpoint. In *R.A.V.*, the ordinance banned fighting words that provoked violence only on the basis of race, color, creed, religion, or gender. Only such "disfavored subjects" of speech were banned. *Id.* at 391.

In contrast, the Virginia ordinance bans *all* cross burning that is intended to intimidate regardless of the subject or target. As such, it does not discriminate based on content. As a historical matter, it may be true that cross burners have often espoused similar viewpoints. But, those viewpoints are not elements of the statutory prohibition and are thus irrelevant for purposes of constitutional analysis. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (upholding facially-neutral law prohibiting destruction of draft cards even though, as a factual matter, most people who destroyed draft cards were protesting the Vietnam War). The lower court should therefore be reversed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JANET NAPOLITANO
Attorney General of Arizona

PATRICK IRVINE*
Solicitor General
TODD F. LANG
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8384

[Additional Counsel Listed on Inside Cover]

**Counsel of Record*

February, 2002